United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

No. 77-7237

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs-Appellees

P/S

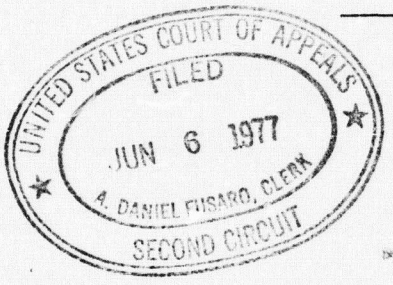
v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, ET AL.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES, AMICUS CURIAE



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QUESTIONS PRESENTED

By orders of this Court entered on May 25, 1977, to the Departments of Transportation and State, the participation of the United States was requested in this litigation to the extent of responding to the following three questions:

(1) Whether the power of the Port Authority to refuse landing rights at Kennedy Airport may be preempted by orders of

the Secretary of Transportation and the Federal Aviation Administration.

(2) Whether preemption has occurred in this case because of the order of the Secretary of Transportation dated February 4, 1976, and the April 2, 1976, amendments to the Operations Specifications of Air France and British Airways.

(3) Does the Port Authority resolution of March 11, 1976, denying appellees permission to operate the Concorde into or out of John F. Kennedy Airport, offend any relevant international treaties or agreements.

ARGUMENT

Introduction and Summary of Argument:

The Federal Government's policy, as stated on several occasions by both the President and the Secretary of Transportation, is to support the earlier determination which authorized a 16-month demonstration of the Concorde at both Kennedy and Dulles Airports. In reaffirming the wisdom of this limited demonstration, it is recognized that the very heart of temporary Concorde authorization is the realization of substantial benefits which will flow from a full test of this new technology. These benefits include, among others, further assessment of the aircraft's

environmental impact, measuring noise levels during actual commercial operations, gaining additional data on subjective community response to the Concorde's unique noise characteristics[1/] and participation in the process of developing international standards for the protection of the stratosphere. In banning Concorde operations at Kennedy, the Port Authority has diminished measurably the value of the demonstration. At the same time, the Port Authority's action has also deprived the United States of other important benefits, the most significant being the good will of our allies which would flow from a fair test of the Concorde. On several occasions, President Carter has indicated his strong support for the 16-month demonstration period as the "basis for reaffirming the close ties between the United States and Britain and France * * * ."[2/] For this reason, he has stated that "where the Federal Government has had [the] authority, the test flights are now being conducted by the Concorde at Dulles, near

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1/ This factor is of particular importance in view of the differing characteristics of the two airports. In his decision, Secretary Coleman had noted (p. 49): "Noise is not an objective experience; people do not agree on how objectionable a given sound may be. Noise is a source of great irritation to some, but of little to others. People may react more intensely to Concorde noise than they would to another new and equally loud source, merely because of the controversy which has surrounded the introduction of that aircraft."

2/ Presidential Documents, 1977, Vol. 13, No. 8, p. 213.

Washington."[3/] In responding to personal messages from the Prime Minister of the United Kingdom and the President of France, the President indicated "that he shared the desire of the two European leaders to approach this matter in a way that reflects the close friendship between our countries."[4/] Such good will is essential for a healthy international aviation system. The perpetuation of order in the field of international aviation rests in large part upon the good faith of the parties and upon the recognition that self interes is best served through long-term international co-operation. For many years, both the Port Authority and New York have enjoyed a pre-eminent role in international commerce. It would be ironic and unfortunate if they were to suffer and the country as well from a diminution of international good will caused by their refusal to participate in this temporary, limited Concorde demonstration. Thus, the United States believes that the Port Authority's ban on Concorde test flights at Kennedy Airport is unfortunate and ill-advised.

When former Secretary of Transportation Coleman authorized the 16-month demonstration period, his decision recognized that the Concorde would require the necessary authorizations from airport operators where service was proposed. As we shall develop in greater detail below, we believe that under the existing statutory framework, Congress did not intend to provide, and the Executive did not intend to exercise, the power to preempt an

3/ Presidential Documents, 1977, Vol. 13, No. 19, p. 634.
4/ Presidential Documents, 1977, Vol. 13, No. 8, p. 213.

airport proprietor from excluding any aircraft on the basis of noise considerations. Further, we do not believe that in authorizing the Concorde demonstration at Kennedy Airport, the Secretary acted in such a fashion as to preempt the Port Authority from its traditional role as airport proprietor. However, we do believe that the Port Authority is obligated to conduct its proprietary determinations in a reasonable manner and one that is not unfair or discriminatory. There is evidence that this is not the case. Specifically, the Port Authority has ignored its own resolution of March 11, 1976, to assess and report in a timely fashion upon Concorde noise as that data became available from operations elsewhere. Also, it has given no reason why the Concorde is not acceptable under standards generally applicable to other aircraft operating at Kennedy. Thus, we believe that the Port Authority's proprietary powers may have been exercised in a discriminatory fashion, and in addition, dilatory, arbitrary and unreasonable. Accordingly, if the ban on Concorde test flights should be stricken by this Court, the result of the opening of Kennedy Airport to the Concorde demonstration would be consistent with the Government's policy of conducting a fair test at both Kennedy and Dulles Airports.

I.

THE POWER OF THE SECRETARY TO PREEMPT AN AIRPORT PROPRIETOR FROM EXCLUDING AIRCRAFT FOR NOISE CONSIDERATIONS

As the Supreme Court recently reiterated in Jones v. Rath Packing Co., ____ U.S. ____, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977), the power of the Federal Government to override State and local regulation under the Supremacy Clause of the Constitution, Art. III. sec. 2, may take several forms. The exercise of federal supremacy commonly referred to as "pre-emption" occurs where Congress has determined, either explicitly or by implication, that its enactments alone are to regulate an aspect of commerce. In such areas of Commerce, State and local authorities are precluded from regulating even where their exercise of authority would be consistent with, or supportive of, federal objectives. Jones v. Rath Packing Co., supra, ____ U.S. ____, 97 S.Ct. at , 51 L.Ed.2d at 614; City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

Federal supremacy also supersedes local action where there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963). In deciding whether such a conflict exists the judicial task is to "determine whether under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes of Congress." [Citations

omitted.] Jones v. Rath Packing Co., supra, ____ U.S. ____, 97 S.Ct. at 1309, 51 L.Ed.2d at 614. Essentially then, "preemption" turns squarely on Congressional intent to totally occupy a field of regulation while "conflict" may arise from the implementation by the Executive of non-preemptive but admittedly supreme Federal statutes.

There can be no doubt that with respect to certain areas of aviation regulation, such as control of navigable airspace, establishment of air navigation facilities, operation of the air traffic control system and certification of pilots and aircraft, Congress has mandated preemptive federal authority to be exercised by the Federal Aviation Administration. Manifestly, there is an obvious need for unified control to repose in a single authority for reasons of safety and efficiency. Moreover, Congress' explicit declaration that the "United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace," Federal Aviation Act of 1958, sec. 1108(a), 49 U.S.C. 1508(a), completely reserves these areas to federal control. See also, Federal Aviation Act of 1958, sec. 103(c), 49 U.S.C. 1303(c); sec. 307, 49 U.S.C. 1348; sec. 501, 49 U.S.C. 1401; sec. 601, 49 U.S.C. 1421. In construing these particular statutory provisions, the courts have consistently recognized the preemptive determination of Congress. American Airlines v. Town of Hempstead, 272 F.Supp. 226 (E.D.

N.Y. 1966); Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812 (C.A. 2, 1956); Rosenhan v. United States, 131 F.2d 932 (C.A. 10, 1942), cert. den., 318 U.S. 790 (1943). The same cannot be said of aircraft noise regulations.

It is the view of the United States that neither preemption nor conflict is present in this case. We do not believe that Congress has preempted airport proprietors such as the Port Authority from imposing airport operational restrictions to reduce aircraft noise. Such restrictions, however, may not be imposed in either an unreasonable or discriminatory manner. Similarly, no conflict can be said to exist at the present time between the Secretary's order amending the operations specifications of British Airways and Air France to allow the Concorde demonstration and existing local regulations. On the contrary, when Congress enacted Section 611 of the Federal Aviation Act as amended by the Noise Control Act of 1972, 49 U.S.C. 1431 -- the principal aviation noise statute -- it expressed the intent that local airport proprietors not be preempted from enforcing operational rules to reduce aircraft noise provided that such regulations do not discriminate or unduly burden interstate or foreign commerce.

In the City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973), the Court held, on grounds of preemption, that a city

government could not employ its police power to impose a curfew on the privately owned and operated Lockheed Airport. In footnote 14 of the majority opinion, however, the Court expressly declined to consider "what limits, if any, apply to a municipality as a proprietor" 411 U.S. at 635, 636, noting:

> * * * [A] letter from the Secretary of Transportation [to the Senate Commerce Committee working on the 1972 amendment of Section 611] also expressed the view that "the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports on the basis of noise considerations so long as such exclusion is nondiscriminatory." [Emphasis added.] This portion as well was quoted with approval in the Senate Report.
>
> Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits if any apply to a municipality as a proprietor.

Because the Burbank decision avoided the issue of proprietor rights, its holding is of little use in the resolution of this controversy. Far more helpful is the thoughtful and well-reasoned opinion which we adopt here of the court in National Aviation v. City of Hayward, 418 F.Supp. 417 (N.D. Cal. 1976), a case directly involving the question left unanswered by Burbank. In the Hayward case, Judge Peckham concluded that the city, in its capacity as proprietor of the Hayward Air Terminal, could lawfully prohibit all aircraft which exceeded a noise level of 75 dBA from landing or takeoff between 11 p.m. and 7 a.m. The court rested its decision upon the "clear expression of legislative intent" underlying Section 611 that the right of airport proprietors to enforce reasonable noise regulations be recognized and exempted from federal preemption.

It should be noted that the comments in 1972 by the Secretary of Transportation on the proposed amendment of Section 611, as identified by the courts in Burbank and Hayward as part of that "clear expression" do not represent any change in the historic position taken in this matter by the Department of Transportation. Nor can it be said that Congress has waivered in its determination to preserve this power of the proprietor. In 1968, when Congress first promulgated an earlier version of Section 611, the Senate report provided as follows (S. Rep. 1353, 90th Cong. 2d Sess., p. 6):

> * * * It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments. 5/

Putting the Concorde aside for one moment, and turning to subsonic domestic aircraft for which the Federal Aviation Administration has promulgated noise standards, airport proprietors are not barred from applying their own noise limitations. These standards were enacted pursuant to the provisions of Section 611 and are contained in Part 36 of the Federal Aviation Regulations, 14 C.F.R. 36. In 14 C.F.R. 36.5, the regulation specifically provides:

> Pursuant to 49 U.S.C. 1431(b)(4), the noise levels of this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of, any airport. [Emphasis supplied.]

Thus, we believe as did the court in Hayward, that ultimately the clear expressions of legislative intent and contemporary administrative interpretation must control. As Justice Douglas stated in Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947):

> * * * [When] Congress legislate[s] in a field which the States have traditionally occupied * * * [the] powers of the States [are] not

5/ A larger portion of the Senate Report appears as Appendix A to this brief.

> to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress * * * .

The Hayward court followed that analysis of Justice Douglas. The opinion states, 418 F.Supp. at 424-425:

> * * * Accordingly, while the Congressional purpose was undoubtedly clear enough to the Burbank majority to rule that a municipality's police power regulations regarding aircraft noise at an airport, which it was not the proprietor of, invaded an area exclusively reserved for federal control, this court cannot, in light of the clear Congressional statement that the amendments to the Federal Aviation Act were not designed to and would not "prevent airport proprietors from excluding any aircraft on the basis of noise considerations," make the same finding with respect to regulations adopted by municipal airport proprietors. If Justice Douglas' comments regarding the need for a "uniform and exclusive system of federal regulation" prove correct, Congress and the FAA can take the appropriate steps to provide such a regulatory system. However, at the present time, Congress and the FAA do not appear to have preempted the area, and therefore, the City of Hayward, as proprietor of Hayward Air Terminal, cannot be enjoined from enforcing ordinance 75-023 C.S. on preemption grounds.

We believe the Hayward court correctly applied what Congress said in enacting Section 611 to the issue of proprietor's rights. The decision is instructive, for in amending the operations specifications, the same question is at issue here. We believe the result should be the same, and that this Court should conclude that Congress did not empower the Secretary to preempt the Port Authority's role as airport proprietor.

In supporting the decision of the previous administration that it is in the public interest to allow the 16-month demonstration of the Concorde, this administration has found itself with a clearly limited role. On the one hand, the President has clearly stated that for both domestic and foreign policy reasons, it is in the best interests of the country to continue the demonstration at Dulles Airport and to begin it at Kennedy Airport. Thus, the test flights have continued at Dulles where the Federal Government acts as owner and operator of the airport. On the other hand, the President -- and the Federal Government -- are limited in the role they may play relating to the commencement of Concorde service to New York.

Of course, the President does have a significant role to play in international aviation. For example, pursuant to 49 U.S.C. 1461, the issuance, denial, transfer, and amendment of the terms, conditions and limitations contained in the permit of a foreign air carrier issued by the Civil Aeronautics Board is subject to the approval of the President. The statutory scheme recognizes that such approvals frequently involve considerations of foreign policy and international relations; judicial review of these decisions is prohibited. 49 U.S.C. 1486(a). C.& S. Air Lines v. Waterman Corp., 333 U.S. 103, 109 (1948).

But the President's power to control the access of foreign aircraft to non-federally owned airports is not

comparable to those he exercises with respect to foreign air carrier permits. For example, there is no authority that he could have invoked to speed the decision to amend the operations specifications of British Airways and Air France; he had no power to waive the requirements of the National Environmental Policy Act and thereby avoid the time-consuming task of preparing a satisfactory environmental impact statement. Similarly, the constraints imposed by Congress in the field of aviation noise regulation have precluded the Federal Government from directing the Port Authority to relinquish its proprietary role despite important domestic and international considerations. However, these statutory constraints have not prevented the Federal Government from urging the Port Authority to act in a responsible manner to allow the Concorde to operate at Kennedy, or from criticizing the exercise of the proprietary power in what we believe to be an unreasonable manner.

In summary then, the Congress has declared that the responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The Secretary of Transportation and the Federal Aviation Administration recognize the Congressional declination to preempt the proprietor's power, and as we next show, have conducted themselves accordingly in authorizing the Concorde demonstration at Kennedy.

II.

THE EFFECT OF THE ORDERS OF THE SECRETARY OF TRANSPORTATION AND THE FEDERAL AVIATION ADMINISTRATION PERTAINING TO THE CONCORDE

Having reviewed above the clear expressions of Congressional and Administrative intent not to displace an airport proprietor's right to deny landing rights to aircraft for noise considerations, it would necessarily follow that the Secretary of Transportation and the Federal Aviation Administration have not in this case preempted the rights of the particular proprietor involved here. Our response, however, must go beyond this point inasmuch as the district court found an "irreconcilable conflict" arising out of former Secretary Coleman's decision, rather than an assertion of preemption.

It is the position of the United States that the Coleman decision, reaffirmed by Secretary Adams, and the amendment of the operations specifications implementing that decision were not intended to, and do not, deny to the Port Authority power to establish its own noise rules.

The administrative process which culminated in the Secretary's February 4, 1976, decision uniformly reflects the Federal Government's understanding that a decision to grant the requisite Federal approval for scheduled commercial operations would not obviate the need for British Airways and Air France

to obtain any necessary approval by individual airport operators. The Environmental Impact Statement upon which the February 4, 1976, decision was based in part states that:

> regardless of the Federal decision on the applications, the airlines must obtain any necessary authorization from the airport operators whose airports they proposed to serve before flights could be conducted to those airports. In this instance, while FAA operates Dulles International Airport, the Port Authority of New York and New Jersey operates John F. Kennedy International Airport.

EIS, pp. I-4 to I-5. Other declarations to the same effect appear in the EIS at pages I-8, II-1 and X-11 of that document.

More importantly, the decision to authorize the limited Concorde demonstration itself expressly contemplates that airport proprietors would retain their traditional role under the circumstances here. The decision states:

> The FAA is the proprietor of Dulles and it is therefore part of my decision today to direct the Federal Aviation Administrator to permit one Concorde flight per day at Dulles by each carrier under the conditions noted. The situation with respect to JFK may be complicated by the fact that under federal policy that has hitherto prevailed a local airport proprietor has had authority under certain circumstances to refuse landing rights. If for any legitimate and legally binding reason it should turn out that the JFK part of the demonstration could not go forward--and no one has indicated to me any such final disposition by JFK's proprietor--that would obviously be extremely unfortunate and would greatly diminish, but in my opinion it would not destroy, the validity of the demonstration.

Decision, p. 3, fn. 6.

Thus, the Secretary did not by his decision preempt the role of the Port Authority.

Of course, as stated earlier (supra, p. 7), the Secretary and the Federal Aviation Administration are vested with broad powers to regulate the use of navigable airspace, 49 U.S.C. 1348, develop systems for safe and efficient air navigation, 49 U.S.C. 1353, promote and undertake research relating to transportation, including aircraft noise abatement, 49 U.S.C. 1431, stimulate technological advances in transportation, 49 U.S.C. 1653, and issue orders, rules and regulations that may be necessary to perform the powers and duties imposed by the Federal Aviation Act and the Department of Transportation Act. It was pursuant to these powers that the Department's Federal Aviation Administration promulgated Part 129 of the Federal Aviation Regulations, 14 C.F.R. Part 129, establishing the requirement of operations specifications for flight into U.S. airspace. 6/ Because Part 129 requires that British Airways and Air France obtain amendment of their operations specifications

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6/ As provided by that part of the Federal Aviation Regulations, "operations specifications" include a list of the type of aircraft to be flown, the airports to be served, and the route and flight procedures to be followed. An application for operations specifications or for amendments thereto must be approved and issued before a foreign air carrier may begin commercial air service to and from the United States. Federal Aviation Regulations also require operations specifications for U.S. air carriers. 14 C.F.R. 121.3.

to provide for scheduled Concorde service into the United States, and because such an amendment was considered a potential "major federal action significantly affecting the quality of the human environment" within the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(c), the Secretary of Transportation undertook the detailed environmental assessment which ultimately led to his determination to authorize amendment of the carriers' operations specifications on a provisional, 16-month basis and subject to a number of conditions and limitations.

All these measures taken by the Secretary were necessary to obtain the requisite federal-level approvals for commercial Concorde flights. However, the granting of such federal approval in no way nullified the separate exercise of proprietor regulation at Kennedy Airport. If, as the district court apparently believed, the issuance of operations specifications reflecting Concorde service was preemptive, no airport operator could ever regulate operations to reduce noise since federal approval or amendment of operations specifications is necessary with respect to all air carrier flights. Thus, we submit that the particular actions of the Secretary of Transportation and the Federal Aviation Administration cannot be said to have invalidated State and local regulations on grounds of conflict. The federal actions have comported fully with the existing

regulatory scheme which, as we demonstrated earlier, has consistently received the approval of Congress by preserving reasonable proprietor regulation.

III.

THE UNREASONABLE AND ARBITRARY BAN BY THE PORT AUTHORITY AGAINST CONCORDE FLIGHTS

In requesting participation by the United States amicus curiae, the Court, in its orders of May 25, 1977, directed that the Government address three specific questions. We believe we would be remiss, however, if we did not also state that there may be grounds, different from those relied on by Judge Pollack, which would justify invalidating the Port Authority resolution banning the Concorde test. Such a final result would be in keeping with the view of the Federal Government that although preemption has not occurred, the Concorde should be allowed to land at Kennedy Airport. As we stated in Point I, the airport proprietor retains the power to exclude aircraft on the basis of noise considerations so long as such exclusion is not discriminatory or unreasonable. Here, we believe that the Port Authority may have abused its proprietary power to the detriment of British Airways and Air France. We believe that if a case of unreasonable or arbitrary action against them by the Port Authority can be sustained, the Port's action in banning the Concorde should not

be judicially sanctioned. Thus, although arbitrary action was not the basis for the district court's decision, we submit that if such unreasonableness were manifest, that would sustain the result below. United States v. American Ry. Exp. Co., 265 U.S. 425, 435 (1923); Jamesbury Corporation v. Worcester Value Company, 443 F.2d 205, 208, fn. 3 (C.A. 1, 1971); United States v. Campbell, 293 F.2d 816, 822 (C.A. 9, 1961); Moore's Federal Practice, sec. 0.416[5] (2nd Ed.).

In essence, our contention regarding the Port Authority's conduct as proprietor is that it may have unfairly and unreasonably withheld a decision on whether the Concorde should be allowed to land on a trial basis. Unlike previous instances where airlines have sought to introduce new aircraft at Kennedy, the Port Authority in this case has banned the Concorde by refusing to decide whether its noise is acceptable. Under the guise of studying the matter, the agency has deprived the operators of a finding on its acceptance, and has deprived them as well of the opportunity to show that under existing applicable Port Authority noise standards, the Concorde can achieve a level of compliance equal to that of other aircraft now using the airport. We believe that the Port Authority's failure to decide is unreasonable; and when viewed in the context of its past practices and the circumstances here, may be discriminatory or arbitrary as well. Certainly, while the local authority has the right to regulate airport noise levels, it is unreasonable for that authority to deny airlines an opportunity to prove that their aircraft, in fact, can meet those noise levels.

As stated by the agency in its memorandum in opposition to the airlines' motion for summary judgment (pp. 9-10), the "Port Authority has consistently enforced its noise restrictions on the use of subsonic jet aircraft at its air terminals." These restrictions were set at essentially the noise level of the DC-6B, a four-engine propeller aircraft. In a statement submitted to Congress by the Secretary of Transportation, it was recalled that in the dawn of the jet age, this test was applied to three types of aircraft: the French Caravelle, a two-engine jet, and the American Boeing 707 and the British Comet, both four-engine jet aircraft. The Caravelle passed the agency's test, while the Boeing 707 and British Comet failed until noise suppressors were installed on their engines and power cutback procedures were employed on take-off. 7/ Thus, each version of the new jet technology was afforded the opportunity to comply with the agency's noise regulation. Where compliance was not initially achieved, the information gained from testing allowed the aircraft operators an opportunity to make the modifications required to secure compliance.

The Port Authority's noise standard was very much in issue during the agency's meeting of March 11, 1976, to consider

7/ Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 11.

Concorde flights. The minutes of that meeting, a part of the record here, reflect the Port Authority's concern over Concorde noise. 8/

> The unique noise characteristics of the Concorde and the expected aggravated community response to this noise add new and serious dimensions to the present aircraft noise problem, one not reflected in the Port Authority's current noise standard.

At that meeting, in addition to imposing a ban on Concorde at Kennedy, the agency resolved as follows:

> RESOLVED, that the Director of Aviation is directed to analyze Concorde flights for a period of six months at Dulles International Airport and also at Heathrow and DeGaulle Airports, the community reaction thereto, the results of the Department of Transportation mandated monitoring program at Dulles, and, if necessary, request the Federal Aviation Administration to modify such program, or otherwise to secure additional information concerning the Concorde's noise and other environmental characteristics; and it is further
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> RESOLVED, that the Executive Director be and he hereby is authorized to retain such number of consultants in connection with the foregoing study as he may deem advisable; and it is further
>
> RESOLVED, that the Executive Director and the Director of Aviation be and they hereby are directed, at the end of the foregoing six

8/ The minutes were appended to the airlines' complaint and also, we believe, appear elsewhere in the record.

> month program, based upon analysis of noise data and community reaction thereto, to make a recommendation to the Commissioners as to the acceptability of supersonic operations at Kennedy International Airport. [Emphasis supplied.]

It is a matter of public record that the Concorde has been operating from Dulles Airport since May 25, 1976. From the first day of scheduled service, the Federal Aviation Administration has engaged in a comprehensive noise monitoring program which records and analyzes every Concorde flight. Monthly reports on Concorde noise detail the aircraft's noise and the community response to it. As public documents, these reports are certainly available to the Port Authority and its consultants. Nevertheless, contrary to the explicit terms of its own resolution of March 11, 1976, there has not been any published report of analysis by the Port Authority of Concorde operations. The 6-month study period identified in the resolution has expired more than six months ago without any public indication of when the Port Authority will reach a determination regarding "the acceptability of supersonic operations at Kennedy International Airport."

As noted above, the Port Authority in the past exercised its proprietary power to require noise suppression techniques and operations as a precondition to the operation of flights of the very first of the commercial jet aircraft (the British Comet) as well as this country's initial endeavor in the field

(the Boeing 707). But by refusing to evaluate and report on the noise characteristics of the Condorde -- the first generation of an even newer technology -- the Port Authority has deprived this new technology from similarly accommodating itself to the proprietor's noise standards. We believe this constitutes unreasonable, arbitrary action by the airport proprietor, and may be sufficient grounds for striking down the ban against the aircraft.

Furthermore, the refusal of the Port Authority to make a determination on Concorde's acceptability becomes even more unreasonable and offensive in view of the latest efforts by the airlines to satisfy the agency's noise concerns.

Prior to adoption of its special March 11, 1976, resolution imposing a blanket ban on Concorde and other SSTs, the only applicable Port Authority restriction was the rule imposing a noise limit of 112 PNdB (perceived noise in decibels) as measured at selected locations under the take-off paths in communities surrounding the field. It is our understanding that subsonic aircraft regularly violate the 112 PNdB limit without being denied future access to JFK or other sanctions. It is also our understanding that in a recent conference with Port Authority representatives, officials of British Airways and Air France presented a technical noise study which indicated that the Concorde could achieve a degree of compliance with the Kennedy noise regulations that is similar to the compliance

currently achieved by existing jet aircraft.[9/] Under these circumstances, the Port Authority's continued silence and inaction appear even more inexplicable.

In sum, we reaffirm our view of the role accorded to the airport proprietor as discussed in Point I. But equally important, we submit that the power to exclude aircraft for noise considerations must be exercised in a fair, reasonable and nondiscriminatory manner. "The Port Authority is an arm and agency of the States of New York and New Jersey, and in all of its activities, is engaged in the performance of essential government functions" [citations omitted]. Port of New York Authority v. J.E. Linde Paper Co., 127 N.Y.S.2d 155, 158 (1953). As such, its deliberations must be fair and reasonable. As the proprietor of an international airport, its determinations must be free from even the taint of discrimination, unreasonableness, or arbitrary action. Our understanding of the facts in this case indicates that the Port Authority's deliberate refusal to determine whether Concorde operations at Kennedy Airport are acceptable may be so unreasonable as to constitute an independent basis for affirming the judgment below.

9/ Prior to submitting this data to the Port Authority, the airlines requested the Federal Aviation Administration to evaluate the technical competence of the study. In a letter that is set forth in full to Appendix B to this brief, the FAA found the airlines' study to be "technically sound."

IV.

THE CONCORDE BAN AND INTERNATIONAL AGREEMENTS AND TREATIES

It is believed by the United States that it would not be in its interests to submit a response to the third question as stated on page 2 of the brief. There are currently in progress negotiations to renew or replace the existing bilateral air transport agreement between the United States and the United Kingdom. In the view of the United States, the expression in an amicus curiae brief of the views of the United States on the effect of the applicable international agreements might impede a satisfactory resolution of that extremely important international negotiation.

We would note further that the district court did not reach this issue, and that the issues considered in Points I, II, and III of this brief provide a basis for deciding this appeal without reference to the provisions of the existing agreements.

CONCLUSION

As we stated in Points I and II, we do not believe that preemption either could or has occurred in this case. However, the Port Authority may have exercised its proprietary powers in such a manner that its ban against the Concorde could not survive judicial scrutiny. We believe its actions have been unfair,

dilatory, arbitrary and unreasonable. If this Court should agree, a basis independent of that found below would serve to allow the Concorde to operate at Kennedy on a trial basis and would lead to affirmance of the result reached by the lower court. Such a result would be in keeping with the President's statements on Concorde, and with the position of the Federal Government on the need for the demonstration. The foregoing are the views of the United States submitted pursuant to this Court's order of May 25, 1977.

Respectfully submitted,

JAMES W. MOORMAN,
Acting Assistant Attorney General.

EDMUND B. CLARK
PETER R. STEENLAND, JR.
Attorneys, Department of Justice,
Washington, D.C. 20530.

APPENDIX A

Senate Report 1353, 90th Cong., 2d sess., pp. 6-7

* * * It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments.

In this regard, we concur in the following views set forth by the Secretary in his letter to the committee of June 22, 1968:

> * * * State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.
>
> However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.
>
> Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and

operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

WASHINGTON, D.C. 20591

APR 14 1977

3714

British Aircraft Corporation
(U.S.A.), Inc.
399 Jefferson Davis Highway
Arlington, Virginia 22202

Attention: Mr. H. Perrier, Director of Flight Test, Aerospatiale, and
Mr. R. McKinlay, Design Director, Concorde, BAC, Commercial
Aircraft Division

Gentlemen:

Your letter to me of April 7 requested a technical assessment of your Concorde Noise Performance Report which you presented to the Port Authority of New York and New Jersey on April 1. This technical report is specifically concerned with your analysis of the noise performance of the proposed Concorde operations at John F. Kennedy International Airport (JFK). You have asked for our comments on the following technical issues:

1. Lateral attenuation;

2. Noise abatement approach procedure;

3. Runway utilization plan; and

4. Tail and cross-wind limitations of Concorde.

Your report predicts Concorde noise levels lower than those assumed in the Department's 1975 final environmental impact statement, largely because the report is based on new assumptions about Concorde operational procedures at JFK. The Department's EIS assumed departures with maximum gross takeoff weight, usage of the same runways as most of the subsonic traffic, and standardized lateral attenuation of sideline noise, based on a model used to predict the near-ground attenuation for different types of aircraft.

You are now proposing to take off with approximately 23,000 pounds less fuel than previously assumed. Second, you propose different use of runways from the bulk of air traffic. Third, your technicians have developed a new analysis of ground attenuation specifically related to Concorde. Finally, you propose to use a decelerating approach.

Your analysis is a reasonable prediction of Concorde noise levels if Concordes are operated as you predict which is, of course, subject only to the control of the two carriers operating the Concorde.

Specifically, the following comments are provided:

1. Ground Attenuation

In our 1975 EIS, we used a standard model for determining attenuation of noise on the ground, a standard used for all types of aircraft. We recognize that the actual ground attenuation for any aircraft is different from the standard. Your analysis of the Concorde ground attenuation seems logical to us, and is supported by the manufacturers' measurements. While we have not had the opportunity to verify these measurements, we have no reason to dispute the analysis.

2. Noise Abatement Approach Procedure

We are aware that your proposed decelerating approach is recognized as a normal procedure for the Concorde. Because it requires less thrust on approach, the procedure will provide some noise benefits for those living under the approach paths.

3. Runway Utilization Plan

You propose to use on takeoff whenever possible runways 22R and 31L. When these runways can be used, the departures over the water will reduce impact on residential areas. While this can result in nonconforming runway utilization and possible delay, it is not a unique procedure since heavily loaded flights at JFK already utilize nonconforming departure runways.

4. Tail and Crosswind Limitations on Concorde

You propose to use runways 22R and 31L unless wind conditions exceed 10-knot tailwind and 30-knot crosswind components on those runways. Your review of wind statistics for sixteen years at JFK suggests that this will mean that the Concorde will have to use other more noise-sensitive runways for approximately 1-1/2 percent of operations. While we have not confirmed your statistical assessment of the weather data, we accept these crosswind components as within the Concorde's operating limitations.

In sum, we believe your analysis is technically sound; if the assumptions it is based upon are borne out in practice, the noise reductions you have shown over our EIS data would be realized.

Sincerely,

CHARLES R. FOSTER
Director of Environmental Quality

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77-7237

BRITISH AIRWAYS BOARD AND COMPAGNIE
NATIONALE AIR FRANCE,

Plaintiffs-Appellees

v.

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY, ET AL.,

Defendants-Appellants

CERTIFICATE OF SERVICE

I certify that a typewritten copy of the Brief for the United States, Amicus Curiae has been hand delivered to counsel, this 6th day of June, 1977, to:

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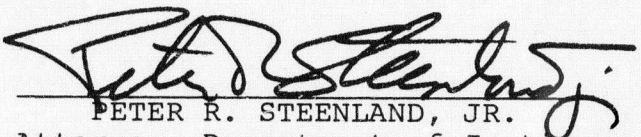

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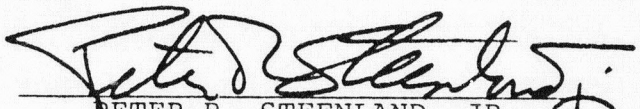

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